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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiff,

v.

WILBUR L. ROSS, JR., *et al.*,

Defendants.

Case No. 5:20-cv-05799-LHK

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' PRIVILEGE
OBJECTIONS**

Defendants submit this response to Plaintiffs’ attempt to strip privilege from all 17 documents on Defendants’ October 4, 2020 privilege log, ECF No. 232-1. As detailed in the attached Declaration of Megan Heller, all redactions and documents on the privilege log fall squarely within the attorney-client and deliberative-process privileges. These documents contain pre-decisional deliberations and legal advice regarding the Census Bureau’s operational plans, draft testimony, and draft legislation. Heller Decl. ¶¶ 7–11. They involve considerations of how to adjust operational plans in light of changing circumstances. *Id.* And they contain agency officials’ reactions to, and analysis of, operational planning and statistical information. *Id.* All of that material is plainly privileged.

In challenging Defendants’ asserted privileges, Plaintiffs seek to overcome the deliberative process privilege on three vague grounds, and the attorney-client privilege with one blanket assertion, all of which are meritless. For starters, Plaintiffs complain that “[t]he only declaration provided by Defendants merely notes the number of documents appearing on the privilege log” and that “[t]here is no formal claim of privilege by the relevant agency employee, much less an assertion of privilege based on that employee’s personal consideration.” Pls.’ Br. at 1, ECF No. 304. But that’s not how the process works. After Defendants produce a privilege log, Plaintiffs must challenge specific documents on the log, and then Defendants may formally invoke the privilege with an agency declaration to support the privilege. *See, e.g., RKF Retail Holdings, LLC v. Tropicana Las Vegas, Inc.*, 2017 WL 2292818, at *6 (D. Nev. May 25, 2017) (“The obligation to produce affidavits to support the assertion of privilege should be limited to the elements of the privilege that are challenged by the withholding party’s opponent and not adequately addressed in the log.”); *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 134 n.13 (D.D.C. 2005) (finding “no obligation to formally invoke the [deliberative-process]

1 privilege in advance of the motion to compel”); *Beilstein-Institut Zur Forderung Der Chemischen*
2 *Wissenschaften v. MDL Info. Sys., Inc.*, 2006 WL 2578264, at *1 (N.D. Cal. Sept. 6, 2006)
3 (explaining that “plaintiffs must bring their motion based on defendant's final privilege log” and
4 should “not challenge the withheld documents in a blanket manner, but should be sure to address
5 the specific documents for which they believe the assertion of privilege is unjustified”).

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7 There’s a good reason for that process: the privilege log “requirement serves to allow the
8 requesting party to contest the contention that the document falls under the privilege and prevents
9 burdensome and non-adversarial *in camera* review of *ex parte* submissions from becoming the
10 norm.” *Desert Valley Painting & Drywall, Inc. v. United States*, 2012 WL 4792913, at *4 (D.
11 Nev. Oct. 9, 2012). This Court has short circuited that process, ordering Plaintiffs’ objections
12 *before* the parties could confer (and potentially narrow) the privilege issues, and *before* Defendants
13 could submit a detailed declaration. Indeed, while Defendants were ordered to produce these
14 documents over the weekend, *see* ECF No. 295, they were also ordered to respond to an email
15 from an enumerator in Colorado, ECF Nos. 289, 292, to answer two additional emails from an
16 enumerator in Oklahoma and a Census Field Supervisor in Alaska, ECF Nos. 291, 298, and to
17 prepare a declaration by the Census Bureau Director, ECF Nos. 288, 300. As Defendants have
18 repeatedly noted, investigating and responding to unsolicited communications from non-parties
19 under extremely short timetables detracts significantly from Census Bureau officials’ efforts to
20 monitor key census operations in the critical closing stages of the 2020 Census. *See, e.g.*, ECF
21 No. 298 (describing the 116 hours that the Assistant Director for Field Operations and his staff
22 have devoted to court-ordered responses to unsolicited communications). In these extraordinary
23 circumstances, as in all ordinary circumstances, Defendants did not need to formally invoke all
24 privileges with their privilege log. *See NetJets Large Aircraft, Inc. v. United States*, 2015 WL
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1 1526346, at *5 (S.D. Ohio Apr. 3, 2015) (rejecting the notion that the deliberative-process
 2 privilege should be waived “unless all of the procedural requirements are met when it is initially
 3 asserted”); *Del Socorro Quintero Perez v. United States*, 2016 WL 499025, at *3 (S.D. Cal. Feb.
 4 9, 2016) (declining to adopt “the proposition that the deliberative process privilege is waived if a
 5 declaration is not provided with the privilege log.”).

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 7 Plaintiffs next complain about three documents withheld in full because they are “dated
 8 September 11 and 13” and because Defendants “provide[d] no details or explanation as to the
 9 agency decision at issue, why the document is deliberative, or why any factual material in the
 10 document is not severable.” Pls.’ Br. at 1. As to the former, it should come as no surprise that the
 11 documents are actually from April/May 2020, as the titles of the documents say as much. For
 12 example, document DOC_0015827 is titled “NRFU Prep List due to Covid **4 29 2020**.pdf,” and
 13 document DOC_0015830 is titled “Next Steps and Questions due to Covid (DCEO-DITD-GEO)
 14 **April**.pdf.” Privilege Log, ECF No. 295-2 (emphasis added). Another document titled “2020
 15 Census Timeline Update (w SDD revisions) + AMA opening v2 **05072020**,” dates from May 7,
 16 2020 (as reflected in the file name). As the Heller Declaration explains, the three documents have
 17 dates in September because that is when the documents were converted to PDF. Heller Decl.
 18 ¶¶ 12(e)–(g). As to Plaintiffs’ other quibble, the privilege log—and now the Heller Declaration—
 19 make clear that these April documents are appropriately protected by the deliberative process
 20 privilege. *Id.*

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 22 Plaintiffs’ third complaint is thrice as risible. They claim that Plaintiffs have some
 23 overwhelming “need” for the documents covered by deliberative-process privilege because they
 24 “very well may demonstrate the arbitrariness of the Secretary’s decision.” Pls.’ Br. at 2. But
 25 Plaintiffs *already demonstrated* the supposed arbitrariness of the Secretary’s decision by
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1 prevailing on their preliminary-injunction motion. *See* Order, ECF No. 208 (granting preliminary
 2 injunction). That’s why, at the September 28 hearing, Plaintiffs themselves explicitly stated that
 3 these documents need not be produced “at lightning speed,” and that production in *three weeks*
 4 “would make sense while the appeal is pending.” Sept. 28, 2020 Hearing Tr. 10:15–20. Plaintiffs
 5 cannot overcome the deliberative-process privilege by claiming some unspecified “need” after
 6 conceding on the record that there is little need for these documents at all.
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8 But the unspecified nature of Plaintiffs’ purported need is itself telling. In determining
 9 whether a party has overcome an agency’s assertion of the privilege in civil litigation, this Court
 10 must balance “the relevance of the evidence,” “the availability of other evidence,” “the
 11 government’s role in the litigation,” and “the extent to which disclosure would hinder frank and
 12 independent discussion regarding contemplated policies and decisions.” *FTC v. Warner*
 13 *Commc’ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984). Plaintiffs fail to address any of these factors,
 14 and with good reason: they cannot satisfy any of them. Take, for example, DOC_0015472,
 15 DOC_0015483, and DOC_0015491. The redactions in those documents are not only covered by
 16 the attorney-client privilege, but contain pre-decisional deliberations about “Director
 17 Dillingham[’s] prepared statement” to Congress. Privilege Log at 1. Plaintiffs make no effort to
 18 explain why that information is any way relevant to their claims or why it is more helpful than the
 19 previously produced non-privileged portions of Director Dillingham’s draft statement (such as
 20 DOC_0008308) as well as a final version of his statement (DOC_0015588). *See* Heller Decl.
 21 ¶ 12(c). In contrast, the Heller Declaration explains precisely why each of the relevant documents
 22 “would hinder frank and independent discussion regarding contemplated policies and decisions.”
 23 *FTC*, 742 F.2d at 1161; *see* Heller Decl. ¶¶ 8–10.
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1 Finally, Plaintiffs complain that attorney-client communications should be disclosed
2 because “numerous entries on the privilege log do not describe the nature of the documents or the
3 context necessary to assess whether legal advice was communicated.” Pls.’ Br. at 2. But “[a] party
4 need not give information” on a privilege log “to the point that the privilege is waived or becomes
5 meaningless.” *In re Application for an Order for Judicial Assistance in a Foreign Proceeding in*
6 *the Labor Court of Brazil*, 244 F.R.D. 434, 438 (N.D. Ill. 2007). Especially “[i]n light of an *in*
7 *camera* review of the [challenged] documents,” Defendants’ “log provides adequate information.”
8 *Id.*; *see also id.* (“Because the Court has been able to perform this *in camera* review, and through
9 such a review determine the applicability of the given privileges, it is unnecessary for McDonald’s
10 to provide any further information.”). In any event, the Heller Declaration explains in great detail
11 the circumstances surrounding each assertion of attorney-client privilege. Heller Decl. ¶¶ 8–11.
12 So there is no reason to order those attorney-client communications disclosed and thwart the
13 agency’s ability “to seek out and receive fully informed legal advice.” *In re City of Erie*, 473 F.3d
14 413, 419 (2d Cir. 2007).

15 For these reasons, Plaintiffs’ objections to Defendants’ privilege assertions should be
16 rejected.
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1 DATED: October 5, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2020, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing.

/s/ Stephen Ehrlich
Stephen Ehrlich